IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CASE NO. 04-1384

NORTH AMERICAN CATHOLIC EDUCATIONAL
PROGRAMMING FOUNDATION, INC.,

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee

ON APPEAL FROM OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISISON

SAMUEL L. FEDER
ACTING GENERAL COUNSEL

RICHARD K. WELCH
ASSOCIATE GENERAL COUNSEL

DANIEL M. ARMSTRONG
ASSOCIATE GENERAL COUNSEL

GREGORY M. CHRISTOPHER
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

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GLOSSARY

ITFS	Instructional Television Fixed Service
CCSD	Clark County School District
NACEPF	North American Catholic Educational Programming Foundation

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BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

STATEMENT OF ISSUES PRESENTED

Section 402(b)(1) of the Communications Act, 47 U.S.C. § 402(b)(1), is the source of jurisdiction over appeals "[b]y any applicant for [a radio] station license, whose application is denied by the Commission." The Administrative Procedure Act provides that a "preliminary . . . or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704. In a radio station licensing proceeding, the Commission denied the application of appellant North American Catholic Educational Programming Foundation, Inc. ("NACEPF"). Preliminary to that denial the Commission granted

a waiver of one of its licensing rules to another applicant competing with NACEPF whose application thereafter was found to be comparatively superior and thus granted. The issues presented are:

1. Whether Section 402(b) is the source of jurisdiction over NACEPF's challenge to the grant of a rule waiver to the competing and ultimately successful applicant, thus requiring the case to be dismissed because NACEPF did not timely invoke the Court's jurisdiction under Section 402(b) by filing the case within 30 days from public notice of the Commission's order.

2. Whether this appeal, even if found to be timely, must nevertheless be dismissed for lack of jurisdiction because NACEPF sought review of an unreviewable reconsideration order, and NACEPF's intent to seek review of the agency's underlying licensing order could not be inferred from the notice of appeal or contemporaneous filings.

3. Whether, if the Court finds that it has jurisdiction in this matter, the Commission in granting NACEPF's opponent a waiver of the four channel limit abused its broad discretion or otherwise violated any procedural rights to which NACEPF was entitled.

JURISDICTION

For the reasons argued herein, the Court does not have jurisdiction. *See* pages 27-36 below. If the Court disagrees, the basis on which it would presumably find its jurisdiction is Section 402(a) of the Communications Act, 47 U.S.C. § 402(a) .[1]

STATUTES AND REGULATIONS

Pertinent statutes and regulations are appended to this brief.

COUNTERSTATEMENT OF THE FACTS

NACEPF now purports to seek review of a decision of the Federal Communications Commission to grant a waiver to Clark County School District ("CCSD") of the rule that limits the number of channels in the Instructional Television Fixed Service ("ITFS") that may be operated by a single entity within a given area. Following grant of the waiver, the Commission in the challenged decision then granted CCSD's application to add additional ITFS channels to its operation in Las Vegas, Nevada, and denied NACEPF's mutually exclusive application after concluding that CCSD's application was comparatively superior under established criteria. *See North American Catholic Educational*

[1] Because NACEPF now argues that Section 402(a) is the source of this Court's jurisdiction, Commission counsel brought this development to the attention of the Department of Justice as counsel for the United States, which would be a party respondent if NACEPF is correct in its present posture that this is a Section 402(a) case. DOJ counsel have authorized us to state that the United States will not participate in this case because they do not view this as a case in which Section 402(a) is a source of jurisdiction.

Programming Foundation, 12 FCC Rcd 24449 (Mass Media Bur. 1997), *recon. denied*, 17 FCC Rcd 5325 (Mass Media Bur. 2002), *review denied*, 18 FCC Rcd 18815 (2003), *recon. denied*, 19 FCC Rcd 20169 (2004)(J.A. , , , ,).

I. Regulatory Background

A. History of ITFS

The FCC created the Instructional Television Fixed Service in 1963 to provide educational and cultural material to students at selected locations that were specially equipped to receive and convert the point-to-point microwave signals. *See Educational Television*, 39 FCC 846, 852 (1963). The Commission also permitted ITFS licensees to transmit instructional material to non-educational institutions such as hospitals, nursing homes, training centers, clinics, and rehabilitation centers. *See Amendment of Parts 1, 21, 73, 74, and 101 of the Commission's Rules*, 19 FCC Rcd 14165, 14171 (2004).

For two decades, in order to promote the educational purpose of the service, the Commission strictly limited both the permissible uses of ITFS and eligibility for ITFS licenses. In 1983, however, the Commission instituted a series of policy changes intended to remedy the perceived inefficient use of that portion of the radio spectrum dedicated solely to ITFS. Faced with an increasing demand for radio frequencies, the Commission reallocated eight channels per market for use by operators of Multipoint Distribution Service ("MDS"), or so-called "wireless cable." *See Report and Order*, 94 F.C.C.2d 1203 (1983). The Commission also

began to allow licensees on the remaining ITFS frequencies to lease excess capacity to MDS operators. *Id.* at 1207.

Soon afterwards, the Commission began to worry that economic incentives might cause the pendulum to swing too far away from the educational use of the ITFS spectrum. The dramatic increase in ITFS applications prompted by the newly permitted commercial uses of the spectrum threatened to squeeze out local educational institutions seeking to provide the programming for which ITFS had originally been intended. The Commission thus declared that "the foundation of the service must continue to be that for which it was designed – the transmission of educational material to accredited schools for the formal education of students enrolled there." *Further Notice of Proposed Rulemaking*, 98 F.C.C.2d 1249, 1252 (1984). Of particular concern was the Commission's observation that "most nonprofit organizations which have applied for ITFS licenses have no local presence in the communities where facilities are sought." *Id.* at 1256. Although the FCC did not wish to exclude nonlocal applicants entirely, it was worried by the prospect that a profusion of such applicants might make it difficult for traditional ITFS providers to obtain the frequencies they needed. Accordingly, the Commission established a "local priority period" of one year, commencing July 28, 1985, during which only local entities were eligible to apply for ITFS authorizations. *See Instructional Television Fixed Service – Second Report and Order on Reconsideration*, 59 Rad. Reg. 2d (P&F) 1355, 1358 (1986). This rule was upheld in *Hispanic Information & Telecom. Network, Inc. v. FCC*, 865 F.2d

1289 (D.C. Cir. 1989). Although the local priority period was allowed to expire, the Commission has never modified its view that "the importance of localism and knowledge of the educational needs of a community cannot be underestimated." *Further Notice of Proposed Rulemaking*, *supra*, 98 F.C.C.2d at 1257.[2]

B. Comparative Licensing Procedures

At the time the applications in this case were filed, the Commission processed ITFS applications according to an "A/B cut-off procedure." After the first application for a particular ITFS channel was filed and deemed by the staff to be substantially complete, the Commission issued a public notice announcing acceptance of the application and specifying a deadline for competing applications or petitions to deny the application. That deadline was called the "A" cut-off date. New applications that were filed by the "A" cut-off date and deemed to be substantially complete were listed in another public notice, and the Commission established another deadline for petitioning to deny those applications and for making certain amendments to all of the applications that had been accepted for filing. The second deadline was called the "B" cut-off date. *See ITFS Second Report & Order*, 101 F.C.C.2d 49, 72 & n.26 (1985); 47 C.F.R. § 74.911(c) (1994).[3]

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[2] In July 2004 the Commission renamed ITFS the Educational Broadband Service and made extensive revisions in the regulations governing that service. *See generally Amendment of Parts 1, 21, 73, 74, and 101 of the Commission's Rules*, *supra*, 19 FCC Rcd 14165. The rule changes are prospective and do not affect the issues presented in this case.

[3] The method has now been changed to a "window" procedure, under which the Commission announces a filing window for all applications for specified licenses. 47 C.F.R. § 74.911(c)(1) (1995). The change has no effect on this case.

Under longstanding Commission policy (variations of the A/B cut-off procedures have been used in AM radio, FM radio, and television licensing for many years), any amendment to an application that would improve the applicant's relative comparative position must be filed by the "B" cut-off date. Late-filed amendments that improve an applicant's comparative position will not be considered. *ITFS Second Report & Order*, *supra,* 101 F.C.C.2d at 74 ("no comparative advantage will derive from amendments filed after the 'B' cut-off date").

Under the procedures in place when this case was decided, when the Commission had accepted for filing more than one ITFS application for the same frequencies in overlapping geographic areas, the Commission employed a point system to choose among these mutually exclusive applications.[4] A maximum of 12 points could be awarded, based on five criteria which were weighted "based on their relative importance in selecting the best ITFS licensee." *Instructional Television Fixed Service – Second Report and Order on Reconsideration, supra,* 59 Rad. Reg. 2d at 1369. The Commission explained:

> Those licensees deemed to have the greatest propensity to implement ITFS objectives in their respective communities during the entire course of the ten-year license period are preferred. In this respect, the process does draw material distinctions among competing applicants,

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[4] Future licensing of this service will be conducted pursuant to the Commission's auction authority contained in 47 U.S.C. § 309(j). *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses,* 13 FCC Rcd 15920, 15999-16001 (1998) (subsequent history omitted).

> while superficial distinctions, features which are subject to change and subjective considerations, are not included.

Ibid. For instance, the Commission pointed out that "the point system gives a strong preference to local entities." *Id.* at 1369-70.

Thus, the Commission awarded the most points – four points – for being a local applicant. Applicants also were awarded three points for being an accredited school or having a direct relationship with an accredited school, two points for proposals complying with the four channel limit, a maximum of two points for exceeding designated amounts of educational and instructional programming, and one point to applicants seeking to move from certain ITFS channels to other channels in order to expand or modify their facilities. 47 C.F.R. § 74.913 (1993); *Instructional Television Fixed Service – Second Report and Order on Reconsideration, supra,* 59 Rad. Reg. 2d at 1369-1373 & n.31.

C. The Four Channel Limit

At the time this case was decided, FCC rules limited ITFS licensees to four ITFS channels serving the same area. 47 C.F.R. § 74.902(d) (1993).[5] The limit was adopted in 1963 to prevent a single applicant from monopolizing the available spectrum. The Commission explained:

> We are concerned that absent such a limitation, an ITFS licensee or applicant could secure all available ITFS channels within a given area, thereby precluding others from providing ITFS services. We deem that such action would not necessarily be in the public interest.

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[5] The rule has now been amended and relocated to 47 C.F.R. § 27.5(i)(3)(1). *See Amendment of Parts 1, 21, 73, 74, and 101 of the Commission's Rules, supra,* 19 FCC Rcd at 14291-92.

Amendment of Part 74 of the Commission's Rules and Regulations in regard to ITFS, 57 Rad. Reg. 2d (P&F) 1166, 1168 (1985).

However, the Commission said that it would waive this rule upon a showing of "how the additional channels will be used for traditional ITFS purposes and why present channel capacity is insufficient to accommodate the additional needs." *Amendment of Part 74 of the Commission's Rules and Regulations in regard to ITFS,* 98 F.C.C.2d 925, 933 (1984). The Commission added that the waiver standard will be "exceedingly high," particularly where a large demand for channels exist, and that the applicant for waiver must overcome a "heavy burden of proof." *Id.; Instructional Television Fixed Service – Second Report and Order on Reconsideration, supra,* 59 Rad. Reg. 2d at 1376.

The principal showing required by an applicant for a waiver of the four channel limit was that a fewer number of channels was insufficient to accommodate the applicant's needs. In that regard, the applicant had to set forth the amount of ITFS programming that was being proposed for all the channels involved, the amount of simultaneous use of the channels for a substantial portion of the day, and the extent of repetition of the programming to be presented. *See Board of Regents, Eastern New Mexico University,* 10 FCC Rcd 3162 (1995); *School Dist. No. 1 in the City and County of Denver,* 3 FCC Rcd 6392, 6393 (1988).

2. The ITFS Applications

On May 13, 1992, NACEPF applied for authority to operate four ITFS channels in Henderson, Nevada. Its proposed operation on those channels would serve Las Vegas.[6]

NACEPF is centered in Providence, Rhode Island, and it described itself in its application as "a non-profit corporation established for the purpose of facilitating the distribution of educational and religious programming to public, Catholic and Judeo-Christian organizations."[7] It listed the programs it would provide in furtherance of its mission, and it also stated its intention to lease "excess capacity" to a commercial wireless cable operator, Superchannels of Las Vegas, Inc. NACEPF said that Superchannels would use its facilities to broadcast the programming of the Arts & Entertainment Channel, Nickelodeon, CNN, ESPN, and several other channels of programming commonly found on commercial cable television systems.[8]

NACEPF's application was placed on an "A" cut-off list with a cut-off date of December 30, 1993.[9] On the cut-off deadline, intervenor CCSD, located in Las

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[6] Cover letter from Todd J. Parriott, counsel for NACEPF, to Donna Searcy, Secretary of the FCC, dated May 13, 1992 (J.A.).

[7] Exhibit 5 attached to NACEPF application (FCC Form 330), dated May 13, 1992 (J.A.). In its brief to the Court, NACEPF says that it "responds to the need for alternative competitive sources of instructional material made necessary by the erosion of standards and basic safety associated with large metropolitan school districts by providing curriculum critical courses that are otherwise unavailable." NACEPF Br. at 6-7.

[8] Exhibit E to ITFS Excess Capacity Airtime Lease Agreement, dated May 4, 1992, appended as Exhibit 4 to NACEPF's application (J.A.).

[9] Public Notice, dated October 7, 1993 (J.A.).

Vegas, filed an application to add the same four ITFS channels to its existing operation. The two applications were thus mutually exclusive.

CCSD was already the licensee of two Las Vegas ITFS stations, KZH-32 and KZH-33, each of which comprised four channels. In order to obtain four additional channels by its current application, CCSD necessarily requested a waiver of the four channel limit.[10]

Preliminarily CCSD noted that it was the tenth largest school district in the country, in which 145,000 students were enrolled in 181 schools. Exhibit 1, *supra* (J.A.). CCSD said that its existing ITFS system was designed to serve the needs of children only in grades kindergarten through six, and that requests for programming for students in grades seven through 12 "have greatly increased the demands on the system." *Id.*

Projected enrollment for the year 2000 was 225,000 with an additional 100 schools, CCSD said, of which 90 were expected to be served by ITFS. "This current and projected explosive growth is straining the resources of the Clark County School District in every area," it said, "including services provided by ITFS." Exhibit 2, *supra*, page 1 (J.A.).

CCSD said that it had just completed work on a strategic plan that identified its needs through the year 2000 and that "an expanded ITFS is necessary to fulfill a

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[10] Exhibits 1, 2, and 3 attached to CCSD application (FCC Form 330), dated December 31, 1993 (J.A.). The four channel limit was in place when CCSD obtained its first eight channels, so presumably CCSD received a waiver of the limit at that time, but we are unable to substantiate that assumption.

major portion of the objectives of this plan." CCSD explained that with the shortage of teachers in certain areas, it was necessarily placing greater reliance on interactive television. *Id.* CCSD added that its ITFS was being used to capacity during school hours and was being used during non-school hours as well, and it claimed that "the planned utilization of the new channels will increase our ability to provide educational service to schools now served and will enable us to meet the ever-increasing demands on our broadcast schedule." *Id.*

CCSD assured the Commission that the additional channels it was requesting "will not duplicate the current ITFS service." It explained:

> [The additional channels] will be providing new sources of programming to satisfy the needs of kindergarten through twelfth grade and will provide specialized needs for math, science, performing arts, English, fine arts, ethnic, and cultural programming, etc. In addition, the Clark County School District has a large film library, a portion of which is distributed via ITFS. With the addition of these channels, we will have the potential to feed more of these films directly to the classroom.

Exhibit 2, *supra*, page 2 (J.A.).

Moreover, CCSD said, the additional channels were critical to its goal of providing "lifelong learning" to Las Vegas citizens in partnership with the University of Nevada, Las Vegas; the Community College of Southern Nevada; and other entities such as PBS's Adult Learning Service. *Id.*

Finally, CCSD concluded, "the current demand for programming already exceeds the capacity of these additional channels." Exhibit 3, *supra* (J.A.). CCSD explained:

> [W]e have had to eliminate some programming scheduled in January 1994 to accommodate a staff development series designed to instruct teachers on techniques for teaching English as a second language. This is just one example of the problems we face. It is critical that we obtain these new channels and get them on line as soon as possible.

Id.

In May 1994, NACEPF filed a petition to deny CCSD's application on the ground that CCSD had not met the "exceedingly high" standard necessary to acquire a waiver of the four channel limit.[11] NACEPF argued that "[a]lthough the waiver request makes reference to worthy educational goals, and asserts that its current ITFS system is inadequate to meet those goals, the request tellingly does not discuss why the district has not sought to make more efficient use of the large block of ITFS spectrum that has already been allocated to it." *Id.* at 2-3 (J.A.). NACEPF suggested that the CCSD should find other ways to reach its target audience besides getting additional frequencies. "Many options exist," NACEPF asserted, "for example a higher tower, greater power output, or a different transmitter location." *Id.* at 3 (J.A.). NACEPF also complained in its petition that granting CCSD additional channels would permit CCSD to monopolize 12 of the 20 ITFS channels available in the Las Vegas area. This, claimed NACEPF, would contravene the FCC's policy of promoting diversity in ITFS services. *Id.* at 5 (J.A.).

CCSD opposed the petition to deny, reiterating and updating the showing made in its application that its existing ITFS system "is wholly inadequate to meet

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[11] Petition to Deny, filed by NACEPF on May 31, 1994, at 2 (J.A.).

the demands imposed by one of the largest and fastest growing public school districts in the country."[12]

CCSD also responded to NACEPF's charge that a grant of CCSD's application would be contrary to the Commission's goal of diversity. On the contrary, CCSD said, "CCSD has agreed to cooperate with NACEPF to provide the petitioner's proposed schools with access to Clark's existing as well as proposed ITFS system. . . . [CCSD] appreciates NACEPF's desire to participate in the provision of ITFS materials to its proposed receive sites and has agreed to lend its assistance to NACEPF to facilitate its educational programming goals." *Id.* at 14-15 (J.A.). Specifically, CCSD said, NACEPF, without holding ITFS licenses of its own, is welcome to develop, produce, and supply quality instructional programming that can be included by CCSD on its system if desired by the intended receive sites. *Id.* at 15-16 (J.A.).

NACEPF replied to CCSD's opposition, labeling as "disingenuous" CCSD's offer to serve NACEPF's receive sites and to consider NACEPF's program offerings.[13] NACEPF also objected to the submission by CCSD in its opposition of the updated and expanded support for its waiver request which in turn, according to NACEPF, served to support CCSD's application. The opposition was filed after the "B" cut-off date, and NACEPF pointed out that the Commission may not

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[12] Opposition to Petition to Deny, filed by CCSD on July 6, 1994, at i (J.A.).

[13] Reply, filed by NACEPF on July 18, 1994, at 8-9 (J.A.).

consider amendments after that date that confer a comparative advantage.[14] *Id.* at 10 (J.A.).

3. The Commission's Licensing Decisions

Before comparing the merits of the two competing applications, the former Mass Media Bureau (now the Media Bureau) reviewed CCSD's request for waiver of the four channel limit. Absent a waiver, CCSD would not be entitled to have its application compared with NACEPF's. Describing the applicable waiver standard, the Bureau observed:

> An applicant seeking waiver of Section 74.902(d) must demonstrate how the additional channels will be used for traditional ITFS purposes and why present channel capacity is insufficient to accommodate the additional needs. . . . In assessing such showings, the Commission has stated that waivers may be granted "only where the applicant can overcome a heavy burden of proof." . . . Among the factors we consider in acting on requests for waiver of the four-channel limitation are the amount of ITFS programming that is being proposed on all the channels involved, the simultaneous use of the channels for a substantial portion of the day, the extent of repetition of programming, and a demonstrated need for the additional channel.

In re North American Catholic Educational Programming Foundation, Inc., 12 FCC Rcd 24449, 12450 (Mass Media Bur. 1997) (J.A.) ("*Bureau Order*"), *citing Board of Regents, Eastern New Mexico University, supra*, 10 FCC Rcd at 3162; *School District No. 1 in the City and County of Denver, supra*, 3 FCC Rcd at 6393; *Instructional Television Fixed Service – Second Report and Order, supra*, 59 Rad. Reg.2d (P&F) at 1376; *Instructional Television Fixed Service – Second Report and*

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[14] *ITFS Second Report & Order, supra*, 101 F.C.C.2d at 74 ("no comparative advantage will derive from amendments filed after the 'B' cut-off date.")

Order, supra, 98 F.C.C.2d at 933. Based on its assessment of CCSD's showing and NACEPF's opposition to that showing described above at pages 11-15, as measured against this waiver standard, the Bureau granted CCSD's waiver request. It found that "Clark County has demonstrated that the requested channels are necessary to provide the wide range of educational and instructional programming proposed." *Bureau Order* at 24450 (J.A.).

The Bureau rejected the argument in NACEPF's Petition to Deny that CCSD was not using efficiently the eight channels already allocated to it and that CCSD should first be required to reconfigure its system in an effort to obviate, at least in part, its need for additional spectrum. The Bureau held that "full utilization of the currently assigned channels is not a prerequisite to an application's request for additional channels." *Bureau Order* at 24451 n.2 (J.A.), *citing* the Commission's decision in *Northern Arizona University Foundation*, 7 FCC Rcd 5943, 5945 n.7 (1992).

The Bureau also rejected NACEPF's assertion that the Commission may not consider in support of the waiver request the supplemental information contained in CCSD's opposition to NACEPF's petition to deny which was filed after the "B" cut-off date. *See* pages 13-14 above. The Bureau noted that the Commission in its comparative assessment will not consider amendments filed after the "B" cut-off date. However, the Bureau noted, the Commission has consistently allowed ITFS applicants to perfect their four channel waiver requests after the cut-off date because the information is used only for the purpose of evaluating the waiver

request, "an analysis that involves no comparison with competing applicants." *Bureau Order* at 24450 n. 1 (J.A.), *citing Board of Regents, Eastern New Mexico University, supra,* 10 FCC Rcd at 3162 n.1; *Northern Arizona University Foundation, supra,* 7 FCC Rcd at 5944 n.6; *School District No. 1 in the City and County of Denver, supra,* 3 FCC Rcd at 6393.

Accordingly, the Bureau concluded that "grant of the waiver requested to Clark County is warranted." *Bureau Order* at 24451 (J.A.).

Having found both applicants basically qualified for the contested license, the Bureau then turned to the procedure for selecting among mutually exclusive applicants. *See* pages 7-8 above. Employing the five established criteria in the point system, the Bureau awarded, first, four "Localism" points to CCSD "because it is physically located in the community it intends to service." *Bureau Order* at 24452 (J.A.). NACEPF was entitled to no "Localism" points because it is headquartered in Providence, Rhode Island, and proposes to serve students in Las Vegas. *Id.*

Next, the Bureau awarded three "Accreditation" points to CCSD because it was an accredited institution that proposed to serve its own students. While NACEPF proposed to serve accredited schools, a factor that satisfies its basic eligibility, the Bureau said, it was not entitled to any merit points under this criterion because it was "not an accredited entity in its own right in the area proposed to be served." *Id.*

Next, the Bureau awarded two points to NACEPF for its compliance with the four channel limit. CCSD was not entitled to any merit points under this criterion. *Id.*

And finally, the Bureau noted that CCSD proposed more than 21 hours of formal educational programming per channel per week, whereas NACEPF proposed less than the required threshold of 20 hours of formal educational programming per channel per week. Therefore, the Bureau said, CCSD was entitled to one "Instructional Programming" point, and NACEPF was entitled to none. *Bureau Order* at 24452-53 (J.A.).

In sum, the Bureau declared, NACEPF was entitled to a total of two points for observing the four channel limit, and CCSD was entitled to eight points under the remaining criteria. "Thus," the Bureau concluded, "Clark County is the tentative selectee." *Bureau Order* at 24453 (J.A.).

The Bureau thereafter denied NACEPF's petition for reconsideration of its decision,[15] and NACEPF filed an application for review with the full Commission. The application for review did not specifically challenge the Bureau's denial of NACEPF's license application. Instead, it focused only on the Bureau's grant to CCSD of a waiver of the four channel limit, claiming that the Bureau failed to apply the correct standard applicable to such waiver requests and that the Bureau's decision was an unexplained departure from Commission precedent.[16] NACEPF

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[15] *In re North American Catholic Educational Programming Foundation, Inc.*, 17 FCC Rcd 5325 (Mass Media Bur. 2002) (J.A.).

argued that "the proponent of the waiver must demonstrate a compelling need for the programming for which the additional channels is requested, and the inability to satisfy that need via other means." *See Commission Order* at 18818-19 (J.A.).

The Commission disagreed with NACEPF's contentions, affirmed the Bureau's decision, and upheld its reasoning in full. *Commission Order* at 18819-21 (J.A.). The Commission declared that CCSD "made a showing at least as strong as the showing made in *Eastern New Mexico University*, where the Commission waived the four-channel limit."[17] There, the Commission noted, it said that an applicant "must demonstrate how the additional channels will be used for traditional ITFS purposes and why present channel capacity is insufficient to accommodate the additional needs." *Id.* In that case, the Commission explained, Eastern New Mexico showed that it could not provide programming to each grade level with only four channels. Likewise in this case, the Commission found that CCSD had demonstrated that its eight ITFS channels were "wholly inadequate" to meet its core educational mission: "[CCSD's] comprehensive schedule for providing programming directed to almost 150,000 students enrolled in kindergarten through 12th grade would not be possible on the channels presently assigned to [it]." *Commission Order* at 18819 (J.A.).

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[16] *See In re North American Catholic Educational Programming Foundation, Inc.*, 18 FCC Rcd 18815, 18818 & n.35 (2003) ("*Commission Order*") (J.A.).

[17] *Commission Order* at 18819 (J.A.), *citing Board of Regents, Eastern New Mexico University, supra*, 10 FCC Rcd 3162.

The Commission noted that NACEPF's contention that the waiver was a departure from precedent was based only on its citation to the Commission's general proposition that CCSD faced a heavy burden in its pursuit of a waiver. NACEPF alleged that CCSD should have been required to make various showings, but, as the Commission noted, NACEPF failed to cite any authority to support its assertions. For instance, NACEPF argued that the waiver request should have been denied because CCSD was not efficiently using the eight channels already allocated to it, and that CCSD should be required to reconfigure its system so that all its receive sites can be served by one transmitter, but NACEPF cited no precedent for those requirements. On the contrary, the Commission explained that it had held previously that full utilization of currently assigned channels is not a prerequisite to an applicant's request for additional channels.[18] Likewise, the Commission continued, NACEPF's argument that a waiver of the four channel limit is justified only where there are no alternative technical solutions available "is an unprecedented standard … [and] we do not believe it should be applied here." *Commission Order* at 18821 (J.A.)[19]

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[18] *Commission Order* at 18820 (J.A.), *citing Northern Arizona University Foundation, supra*, 7 FCC Rcd at 5945 n.7.

[19] NACEPF had criticized CCSD for not exploring "digital compression" as a means of using its channels more efficiently, but it conceded that the Commission had never considered whether the availability of digital compression should provide a basis for denying a waiver of the four channel limit. The Commission declared that "it would be inappropriate to consider such a requirement [now]" and that "such a requirement is more appropriately the subject of a rulemaking proceeding in which the Commission would benefit from the input of all affected parties." Commission Order at 18820 n. 52 (J.A.).

The Commission declared in conclusion that "[i]t is unclear what submissions, if any, could satisfy the 'exceedingly high burden' that NACEPF seeks for the Commission to impose on Clark County," pointing with apparent dismay to NACEPF's suggestion that "the burden would require, at a minimum, that the applicant demonstrate that *a substantial body of students would fail to receive the core educational curriculum in the absence of the requested channel.*" *Commission Order* at 18821 n.59, *citing* NACEPF's Application for Review at 4 (J.A.) (emphasis supplied).

Following the Commission's denial of NACEPF's application for review, NACEPF petitioned for reconsideration of that decision. Consistent with Section 1.106(b)(2) of its rules, 47 C.F.R. § 1.106(b)(2), which specifies limited circumstances when a party may seek reconsideration of a Commission decision denying an application for review, the Commission dismissed NACEPF's petition as repetitious. The Commission found that NACEPF presented no new facts or changed circumstances in its petition that would warrant reconsideration.[20]

4. Preliminary Proceedings in this Court

The Commission's decision denying reconsideration was released October 8, 2004. On November 9, 2004, NACEPF filed the instant appeal of that reconsideration decision – and only of that decision – and stated that it was doing

[20] *In re North American Catholic Educational Programming Foundation, Inc.*, 19 FCC Rcd 20169, 20173 (2004) (J.A.).

so pursuant to 47 U.S.C. § 402(b).[21] NACEPF said in its notice of appeal that Section 402(b) "permit[s] appeals to be taken from decisions and orders of the Commission to this Court by 'any applicant for a construction permit or station license, whose application is denied by the Commission.'" NACEPF added that its appeal is timely because it was filed "within thirty days from the date of public notice of the *Memorandum Opinion and Order*." *See* "Notice of Appeal," *supra*, at 1.

In fact, NACEPF's appeal of November 9 was not timely. The 30th day for filing a timely appeal of the October 8 decision was Sunday, November 7, thus making Monday, November 8, the deadline for timely invoking this Court's jurisdiction under Section 402(b). NACEPF did not meet that deadline, filing instead on November 9. As an apparent consequence of that tardiness, the Court issued an order directing NACEPF to show cause why its appeal should not be dismissed for lack of jurisdiction. *Order*, dated November 16, 2004.

Faced with the prospect of dismissal of its appeal, NACEPF announced in its reply to the order to show cause that the purported jurisdictional basis for its appeal was now Section 402(a), with its 60-day deadline for filing, rather than 402(b) with its 30-day deadline for filing. NACEPF said that it was no longer seeking an

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[21] NACEPF stated that it "hereby files this Notice of Appeal from the decision of the Federal Communications Commission ("FCC" or "Commission") in *Clark County School District*, FCC 04-234, released October 8, 2004 ("*Memornadum Opinion and Order*"). A copy of the FCC's *Memorandum Opinion and Order* is attached hereto." "Notice of Appeal," filed November 9, 2004, at 1. The underlying decision that was the subject of the reconsideration order was never mentioned.

appeal under 402(b) of the Commission's licensing decision but rather was seeking review under Section 402(a) of the Commission's decision to grant CCSD a waiver of the four channel limit. "Response to Order to Show Cause," filed by NACEPF on December 15, 2004.

The Court discharged the order to show cause and directed the parties to address in their briefs whether this case must be dismissed as an untimely appeal under Section 402(b) or whether it may proceed as a timely petition for review under Section 402(a). *Order*, dated March 8, 2005.

In an effort to obviate the need for full briefing and argument, the Commission filed a motion to dismiss on the deadline set by the Court for dispositive motions. The Commission argued that NACEPF's appeal should be dismissed for two reasons. First, the Commission said, NACEPF's attempt to transform its Section 402(b) appeal of the licensing decision into a Section 402(a) petition for review of the waiver decision must fail because the waiver decision was merely interlocutory and subsumed within the Commission's final decision to grant CCSD's application and to deny NACEPF's application.[22] The final order in this case was a licensing decision, the Commission said, which is appealable only under Section 402(b). NACEPF was therefore required to bring its action within 30 days, which it did not, and so NACEPF's appeal was fatally late. *Id.* at 7.

Second, the Commission said NACEPF's appeal should be dismissed because it sought to invoke the Court's jurisdiction with respect to the

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[22] "Motion to Dismiss" filed by the FCC on April 21, 2005, at 6-7.

Commission's order on reconsideration, not the underlying licensing order. There was no mention of the underlying order in the notice of appeal or in any other contemporaneously filed document. Because the reconsideration order is not reviewable on its own, the Commission argued, the appeal should be dismissed even if it is deemed to be timely.[23]

The Court referred the motion to dismiss to the merits panel. *Order*, dated July 7, 2005.

SUMMARY OF ARGUMENT

The Court should dismiss this case as an untimely appeal under Section 402(b). Quite simply, this is a radio licensing case. In the decision under review, the Commission granted one radio application and it denied a competing application, and such decisions are appealable only under Section 402(b). It is undisputed that NACEPF failed to file its notice of appeal within the 30-day period prescribed by Section 402(b). That should be the end of the matter.

The Court should not accept NACEPF's newly-minted theory that jurisdiction arises under Section 402(a), with its 60-day filing period. That position suffers from at least three fatal flaws. First, it contradicts the plain terms of Section 402(b), which embodies Congress's decision to vest exclusive jurisdiction in this Court to review all FCC licensing decisions. Under NACEPF's jurisdictional theory, a frustrated applicant could ask another circuit court to upset

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[23] *Id.* at 8, *citing ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 280 (1987); *Entravision Holdings, LLC v. FCC*, 202 F.3d 311, 315 (D.C. Cir. 2000).

a Commission licensing decision by invoking that court's Section 402(a) jurisdiction to review a component part of the Commission's order (such as the waiver grant in this case). Second, the wavier decision was an interlocutory, preliminary ruling that can be reviewed only in conjunction with the final licensing decision, and this Court's jurisdiction to review that final licensing decision arises from Section 402(b). Third, the Court's exclusive Section 402(b) jurisdiction extends to Commission decisions that are ancillary to, bear a close functional similarity to, or are intimately associated with licensing decisions.

NACEPF also failed properly to invoke this Court's jurisdiction by appealing a nonreviewable reconsideration order, and NACEPF's intent to seek review of the underlying licensing order cannot fairly be inferred. The Court should dismiss.

In the event the Court finds it has jurisdiction, the Court should affirm on the merits. CCSD showed convincingly that, as a provider of educational and cultural broadcast services to one of the largest and fastest growing school districts in the country, its present allocation of ITFS channels was insufficient to meet current demand and future objectives. The Commission's decision to grant CCSD a waiver of the four channel limit was supported by substantial evidence and was a reasonable exercise of the Commission's broad discretion to determine the public interest.

STANDARD OF REVIEW

The jurisdictional issue presents a question of law for the Court to resolve. If the Court has jurisdiction, the Administrative Procedure Act provides that a court must uphold a federal agency's action unless that action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Court has held that such review is "tolerant"[24] and "highly deferential," and "presume[s] the validity of agency action."[25] "The court must determine whether the agency has articulated a 'rational connection between the facts found and the choice made,'" and the court may "reverse only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment."[26]

The case presents a single substantive issue: whether the FCC abused its discretion in granting CCSD a waiver of the four channel limit, which made it eligible for comparative consideration with NACEPF. The FCC may waive its rules provided it explains the reasons for making an exception,[27] and the Court has recognized that a narrow standard of scrutiny applies to judicial review of such rule waivers. The limited scope of review in such situations requires substantial

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[24] *Sarasota-Charlotte Broadcasting Corp. v. FCC*, 976 F.2d 1439, 1442 (D.C. Cir. 1992).

[25] *Kisser v. Cisneros*, 14 F.3d 615, 618 (D.C. Cir. 1994).

[26] *Id.* at 619, *citing Bowman Transp. v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974) and *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971).

[27] *See Orange Park Florida T.V., Inc. v. FCC*, 811 F.2d 664, 674-75 (D.C. Cir. 1987); *Health & Medicine Policy Research Group v. FCC*, 807 F.2d 1038, 1041 n.4 (D.C. Cir. 1986); *Basic Media Ltd. v. FCC*, 559 F.2d 830, 833 (D.C. Cir. 1977).

judicial deference to the Commission's decision regarding how the public interest is best served. *Health & Medicine Policy Research Group v. FCC*, *supra*, 807 F.2d at 1043; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396, 1408 (D.C. Cir. 1995) (Silberman, J., concurring in part and dissenting in part)("[W]e have traditionally afforded an agency determination whether to grant a waiver of a rule maximum deference.").

ARGUMENT

I. In Light Of Fatal Jurisdictional Defects, This Case Must Be Dismissed.

A. Section 402(b) Is The Only Source Of Jurisdiction In This Case, And Under That Section NACEPF's Appeal Was Incurably Late.

Section 402(b)(1) of the Communications Act provides that an "applicant for a construction permit or station license, whose application is denied by the Commission" may appeal the Commission's order only to this Court. 47 U.S.C. § 402(b)(1). *See also* 47 U.S.C. § 402(b)(6) (appeal may be taken to D.C. Circuit by any person who is aggrieved by "any order of the Commission granting or denying any application [for a construction permit or station license]"). As described above, the Commission denied NACEPF's application "for a construction permit or station license" in the Instructional Television Fixed Service and granted CCSD's competing application. That licensing decision falls squarely within Section 402(b).

In order properly to invoke this Court's exclusive jurisdiction under Section 402(b), an aggrieved party must file a notice of appeal within 30 days of the date of public notice of the order at issue. 47 U.S.C. § 402(c). That time requirement is jurisdictional, and any untimely appeal must be dismissed. *Vernal Enterprises, Inc. v. FCC*, 355 F.3d 650, 655 (D.C. Cir. 2004); *Waterway Communications Systems, Inc. v. FCC*, 851 F.2d 401, 405 (D.C. Cir. 1988). It is undisputed that NACEPF failed to file its notice of appeal in this case within the 30-day period prescribed by Section 402(b).[28] That failure deprives the Court of jurisdiction to review the Commission's final order. The Court therefore should dismiss this action as an untimely appeal under Section 402(b).

NACEPF recognized that the Commission's action was an exercise of its radio licensing authority. Its notice of appeal specifically invoked this Court's jurisdiction under 47 U.S.C. § 402(b). *See* "Notice of Appeal," *supra*, at 1. It was only after the Court issued an order to show cause why the appeal should not be dismissed for lack of jurisdiction that NACEPF changed course and suggested Section 402(a) as the source of this Court's jurisdiction.[29] NACEPF was correct the first time – Section 402(b) was the proper jurisdictional basis for its appeal of

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[28] The Commission gave public notice of its reconsideration decision on October 8, 2004, the release date of that order. *See* 47 C.F.R. § 1.4(b)(2). NACEPF, however, did not file its notice of appeal until November 9, 2004, more than 30 days later.

[29] Section 402(a), a "residual" provision, *see WHDH, Inc. v. United States*, 457 F.2d 559, 560 (1st Cir. 1972), authorizes review of final Commission orders not within Section 402(b) – *i.e.*, non-licensing orders – in either the D.C. Circuit or any other circuit in which the petitioner resides or has its principal office. *See* 47 U.S.C. § 402(a); 28 U.S.C. §§ 2342(1), 2343. Section 402(a) petitions for review must be filed within 60 days of public notice. *See* 28 U.S.C. § 2344.

the Commission's licensing action. The Court should reject NACEPF's newly-minted theory attempting to seek refuge in Section 402(a)'s 60-day filing period.

Virtually ignoring the fact that the Commission denied its application for an ITFS construction permit and license and granted CCSD's application, NACEPF purports now to challenge only the Commission's grant to CCSD of a waiver of the four channel limit that enabled CCSD to become eligible for comparison against NACEPF in the licensing process. NACEPF asserts that Commission action on waiver requests is not among the nine matters enumerated in Section 402(b), and thus its appeal properly falls under Section 402(a)'s 60-day deadline and was timely filed. NACEPF Br. at 4. In effect, NACEPF argues that the waiver component of the Commission's decision is all that matters for jurisdictional purposes; the overarching licensing action is irrelevant to the analysis.

That reasoning is wrong. *First*, it would violate section 402(b), which embodies Congress's decision to grant this Court exclusive jurisdiction over Commission licensing decisions. Under NACEPF's theory, it need not have sought review of the Commission's action exclusively in the D.C. Circuit. Rather, it could have challenged the waiver component of the Commission's licensing decision by invoking the Section 402(a) jurisdiction of any circuit court where NACEPF resides or has its principal place of business. *See* 28 U.S.C. § 2343. Any decision by such a court to overturn the Commission's waiver grant would necessarily upset the Commission's decision granting CCSD's application for the

Las Vegas ITFS license and denying NACEPF's competing application.[30] Thus, in the future, frustrated applicants like NACEPF could effectively shift review of adverse Commission licensing actions from the D.C. Circuit to other circuits merely by identifying some related component action (such as a waiver grant to a successful applicant) that does not fall literally within the terms of section 402(b). Such a result is inimical to Congress's decision to centralize review of Commission licensing decisions exclusively in the D.C. Circuit.

Second, NACEPF's theory fails to heed the APA's command that a "preliminary . . . or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704. The Commission's waiver grant was merely a "preliminary . . . or intermediate agency action" that enabled CCSD to become eligible for comparative consideration under the Commission's licensing criteria for ITFS. The "final agency action" in this case was the Commission's denial of NACEPF's application for an ITFS license and the grant of CCSD's competing application. Under the APA, then, any judicial review of the waiver ruling must occur in conjunction with review of the Commission's ultimate licensing action.[31] As demonstrated above, only this Court

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[30] If reversal of the waiver grant did not have that effect on the Commission's licensing decision, NACEPF would gain no advantage from such reversal and would thus lack standing to challenge the waiver ruling.

[31] *See FTC v. Standard Oil of Calif.*, 449 U.S. 232, 245 (1980) (holding that FTC's issuance of complaint against certain companies was not "final agency action" under APA and hence not judicially reviewable before conclusion of the administrative adjudication).

has jurisdiction to review the final Commission licensing action in this case – and the source of that jurisdiction is Section 402(b), with its 30-day time limit.

Third, even if the Court were to accept NACEPF's argument (Br. at 4) that grant of CCSD's waiver request was tantamount to a grant of CCSD's application, and the Court is then satisfied that the waiver ruling is itself a final order subject to judicial review that NACEPF has standing to challenge, Section 402(b) would still remain the only appropriate source of the Court's jurisdiction here. This Court has held that FCC decisions that are "ancillary" to,[32] bear a "close functional similarly to,"[33] or are "intimately associated with"[34] licensing orders are appealable only under Section 402(b).[35] If, as NACEPF contends (Br. at 4), the Commission's waiver decision is sufficiently tied to the Commission's licensing decision to give NACEPF standing to challenge the waiver decision as a final order, the same logic dictates that the waiver decision fall squarely within Section 402(b).

This case is unlike *Vernal Enterprises*, in which the Court found an order denying a fee refund request was not ancillary to licensing. Here, the

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[32] *Helena TV, Inc. v. FCC*, 269 F.2d 30 (9th Cir. 1959); *Tomah-Mauston Broadcasting Co. v. FCC*, 306 F.2d 811, 812 (D.C. Cir. 1962)(order denying petition to stay or revoke construction permit).

[33] *Metropolitan Television Co. v. United States*, 221 F.2d 879, 880 (D.C. Cir. 1955)(order denying protest to grant of competitor's application to change frequency and power of broadcast station).

[34] *WHDH, Inc. v. United States*, *supra*, 457 F.2d at 561.

[35] *See, e.g., Hubbard Broadcasting, Inc. v. FCC*, 684 F.2d 594, 596 (8th Cir. 1982), *cert. denied*, 459 U.S. 1202 (1983)(piecemeal review of radio licensing decision would frustrate Congressional intent); *Cook, Inc. v. United States*, 394 F.2d 84, 87 (7th Cir. 1968)(order returning radio license applications as late filed).

Commission's ruling granting CCSD a waiver was issued in conjunction with a decision that did, in fact, "grant or deny an application." 355 F.3d at 656. The waiver ruling fairly qualifies as an order ancillary to the grant of a radio application and within the scope of the ancillary to licensing doctrine even as construed by the Court in *Vernal Enterprises*.

Having established that NACEPF's appeal can lie only pursuant to Section 402(b), if at all, it is plain that its appeal came too late. The Court should dismiss this case as an untimely appeal under Section 402(b).[36]

B. The Agency Order Specified In The Notice Of Appeal And In All Contemporaneously Filed Documents Is A Reconsideration Order That Is Not Reviewable.

In *Entravision Holdings, LLC v. FCC, supra,* 202 F.3d 311, the Court stated that "a petition for review of an agency order must 'specify the order or part thereof to be reviewed.' Failure to specify the correct order can result in the dismissal of the petition." 202 F.3d at 312-13, *citing* Fed. R.App. P. 15(a); *City of Benton v. NRC,* 136 F.3d 824, 826 (D.C. Cir. 1998); *John D. Copanos & Sons, Inc. v. FDA*, 854 F.2d 510, 527 (D.C. Cir. 1988). The Court added that a failure to specify the correct order is not fatal "if the petitioner's intent to seek review of a specific order can be fairly inferred from the petition for review or from other

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[36] NACEPF cites this Court's decision in *Capital Cities Communications, Inc. v. FCC,* 554 F.2d 1135, 1136 n.1 (D.C. Cir. 1976), for the proposition that the Court can treat its untimely 402(b) appeal as a timely filed 402(a) petition for review because "no prejudice will result to any other party." NACEPF Br. at 5. This argument assumes that the Court has jurisdiction under Section 402(a). In *Capital Cities*, the Court found that such jurisdiction existed. As argued above, the Court does not have jurisdiction in this case under Section 402(a).

contemporaneous filings, and the respondent is not misled by the mistake." *Entravision Holdings, LLC v. FCC, supra,* 202 F.3d at 313. But when the court cannot infer such an intent, failure to specify the correct order "violates Federal Rule of Appellate Procedure 15 and mandates that the court dismiss the petition to the extent petitioner contends it seeks review of that order." *SBC Communications, Inc. v. FCC,* 2004 WL 2091548 (D.C. Cir. Sept. 17, 2004) (decision attached), *citing Small Business in Telecomms. v. FCC,* 251 F.3d 1015, 1022 (D.C. Cir. 2001).

In this case, as in *SBC Communications,* NACEPF challenged an order denying reconsideration. The general rule is that an agency's denial of a petition for reconsideration is not subject to judicial review, and NACEPF identifies no special circumstances that would justify an exception to that rule.[37] *AT&T Corp. v. FCC,* 363 F.3d 504, 507 (D.C. Cir. 2004) (collecting cases).

Moreover, NACEPF's intent to seek review of the Commission's underlying licensing order cannot "be fairly inferred from the petition for review or from other contemporaneous filings."[38] Consider:

- Only the order on reconsideration, "*Clark County School District*, FCC 04-234, released October 8, 2004" (reported at 19 FCC Rcd

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[37] A decision on reconsideration may be subject to review if the request for reconsideration was based on new evidence or changed circumstances. *See Southwestern Bell Tel. Co. v. FCC,* 180 F.3d 307, 311 (D.C. Cir. 1999). That exception does not apply here, and NACEPF does not claim otherwise.

[38] The Court in *SBC Communications*, in circumstances very similar to this case, partially granted motions to dismiss. 2004 WL 2091548.

20169) (J.A.), is mentioned in NACEPF's notice of appeal, including the "Reasons on Which Appellant Intends to Rely" and the "Relief Requested" within that notice.

- Only the order on reconsideration was attached to the notice of appeal.
- Only the order on reconsideration is mentioned in NACEPF's docketing statement of March 31, 2005, which identifies the order on review.
- Only the order on reconsideration is mentioned in the "Rulings Under Review" in NACEPF's "Certificate of Counsel as to Parties, Rulings and Related Cases," filed March 31, 2005.
- Only the order on reconsideration is mentioned in the "Statement of Issues," filed March 31, 2005.
- None of the boilerplate issues listed in the Statement of Issues filed March 31, 2005, are unique to the underlying licensing order; all could reasonably be read to refer to the order on reconsideration.

Because the reconsideration order "is not itself reviewable," *ICC v. Brotherhood of Locomotive Engineers, supra,* 482 U.S. at 280, and because NACEPF's belatedly expressed intent to seek review of a part of the underlying licensing order cannot be reasonably inferred from the notice of appeal or contemporaneously filed documents, NACEPF's appeal must be dismissed. *Entravision Holdings, LLC v. FCC, supra,* 202 F.3d at 313.

The Court's decisions in *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002); *Schoenbohn v. FCC*, 204 F.3d 343 (D.C. Cir. 2000); and *Damsky v. FCC*, 199 F.3d 527 (D.C. Cir. 2000), where the Court was able to infer that the petitioner intended to challenge the underlying order, are not to the contrary. In those cases, although the underlying order was never mentioned in the notice of appeal and contemporaneously filed pleadings, one or more of the issues presented in the Statement of Issues could only have referred to the underlying order and thus gave notice that the petitioner intended to make a substantive challenge to the underlying order. *See Sinclair Broadcasting Group, Inc. v. FCC, supra*, 284 F.3d at 158.

NACEPF seeks to escape dismissal by arguing that the Commission has not shown how it was prejudiced by the defective notice. NACEPF Br. at 5. NACEPF misunderstands the test. Lack of prejudice is not a substitute for notice. As the Court said in *Entravision*, prejudice to the agency becomes an issue only *after* the appellant has satisfied the first part of the test, *i.e.*, that the appellant's intent to seek review of the licensing order could fairly be inferred from its notice of appeal and other pleadings with the Court. *Entravision Holdings LLC v. FCC, supra*, 202 F.3d at 314. *See also Small Business in Telecommunications v. FCC, supra*, 251 F.2d at 1022 n.12 (the Court will consider prejudice to the opposing party only if it first finds it fair to infer intent to seek review of the order in question). Because, as shown above, NACEPF failed to make that showing, whether the Commission was prejudiced is irrelevant.

NACEPF also contends that the Commission "should not be permitted to avoid review by reference to an alleged procedural failing." NACEPF Br. at 5. If that plea were sufficient to ignore the fatal jurisdictional defects in this case, the Court would be required to jettison all jurisdictional prerequisites.

II. The Commission's Decision To Waive The Four Channel Limit Was a Conscientious And Reasonable Assessment Of How Best To Serve The Public Interest.

At the time CCSD filed its application for the ITFS channels in this case along with a waiver of the four channel limit, 47 C.F.R. § 74.902(d)(1) (1993), CCSD was already providing educational and cultural television programming to Las Vegas, the eleventh largest school district in the nation with 145,000 students. It was also one of the fastest growing school districts nationwide. By the time the case reached the Commission the district was the sixth largest in the nation and had approximately 245,000 students. *See Commission Order* at 18815 n.5 (J.A.).

In its waiver request, CCSD demonstrated that its present allotment of eight ITFS channels was "wholly inadequate" to meet its needs and objectives. For instance, as more fully described in the counterstatement at 11-15:

- CCSD was providing more than 45 hours of ITFS programming per channel per week, but in order to do so, it had to cancel over 50 hours of scheduled programming for lack of capacity. *See Commission Order* at 18819 n.46 (J.A.).

- CCSD needed additional channels to provide 68 new ITFS programs, 52 of which were for formal education, 25 of which were to be locally produced. *See Commission Order* at 18819 (J.A.).
- CCSD would not use the proposed channels to duplicate any programming already being presented on existing channels. *See* Exhibit 2 attached to CCSD application (FCC Form 330), *supra*, at 2 (J.A.).

The Commission assessed CCSD's established need for additional channels against the prevailing waiver standard applicable to the four channel limit rule. It examined whether the additional channels would be used for traditional ITFS purposes and why CCSD's present channel capacity was insufficient to accommodate its projected needs.[39] That standard, the Commission observed, takes into consideration "such factors as the amount of use of any currently assigned channels and the amount of proposed use of each channel requested, the amount of, and justification for, any repetition in the schedules, and the overall demand and availability of ITFS channels in the community." *Commission Order* at 18818 (J.A.). Following its examination, the Commission declared that a grant of waiver to CCSD was "consistent with the Commission's Rules and precedent." *Commission Order* at 18819 (J.A.).

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[39] *See Amendment of Part 74 of the Commission's Rules and Regulations in regard to ITFS, supra*, 98 F.C.C.2d at 933.

In its appeal, NACEPF insists that the Commission failed to impose on CCSD the "exceedingly high" standard that it had announced in the rulemaking. NACEPF Br. at 28-29. In that regard, NACEPF claims that the waiver is inconsistent with the Commission's "anti-monopolization policy" because CCSD, with four additional channels, would operate on 60% of the available ITFS frequencies in Las Vegas. NACEPF Br. at 22. NACEPF also claims that the decision is inconsistent with the Commission's "spectrum efficiency goals and policies" because CCSD was not being required to use its existing channel allotment with maximum efficiency before seeking additional spectrum. NACEPF Br. at 24. NACEPF suggests that digital compression or moving CCSD's transmitter could achieve some of the service gains sought by CCSD in its application. NACEPF Br. at 30.

These claims are essentially a disagreement with the Commission over how best to use scarce ITFS spectrum to serve the public interest. As this Court has said, the Commission may waive its rules if "particular facts would make strict compliance inconsistent with the public interest."[40] The Court's inquiry is not whether the FCC's choice was correct, but whether it was supported by substantial evidence or was an abuse of discretion. Here, CCSD, a school district that was bursting at the seams, made a compelling showing that its existing allotment of ITFS channels was inadequate to serve its then-present needs and future plans, which, in the final analysis, is the heart of the waiver test.

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[40] *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). *See also* 47 C.F.R. § 1.3 (2004) (the Commission may waive its rules if good cause is shown).

Moreover, its request was consistent with Commission precedent. As the Commission said, CCSD "made a showing at least as strong as the showing made in *Eastern New Mexico University*," where the Commission waived the four channel limit because the university demonstrated that its existing channel capacity was insufficient to accommodate its needs.[41] Likewise, as the Commission explained, the decision is consistent with *Northern Arizona University*, where the Commission held that full utilization of currently assigned channels is not a prerequisite to an applicant's request for additional channels.[42]

Because the waiver decision is consistent with both the published terms of the waiver standard and with applicable precedent, the decision was not arbitrary or an abuse of discretion and is entitled to judicial deference.[43]

NACEPF argues next that the Commission should not have considered CCSD's supplemental information in support of its waiver request in its Opposition to [NACEPF's] Petition to Deny, filed July 1994, because the pleading was filed after the "B" cut-off date. That date is the deadline for amendments to applications that improve an applicant's position in a comparative assessment. *See* pages 6-7 above.

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41 *Commission Order* at 18819 (J.A.), *citing Board of Regents, Eastern New Mexico University, supra,* 10 FCC Rcd 3162.

42 *Commission Order* at 18820 (J.A.), *citing Northern Arizona University Foundation, supra,* 7 FCC Rcd 5943.

43 *See Orange Park Florida T.V., Inc. v. FCC, supra,* 811 F.2d at 674-75; *Health & Medicine Policy Research Group v. FCC, supra,* 807 F.2d at 1041 n.4; *Basic Media Ltd. v. FCC, supra,* 559 F.2d at 833.

Acceptance of the information was not a violation of the A/B cut-off policy because the information was not used to improve CCSD's status in relation to NACEPF in a comparative assessment. The information instead was directed only toward whether a waiver should be granted. As the Commission observed below, the Commission has consistently allowed ITFS applicants to perfect waiver requests by post "B" cut-off amendments because the supplemental information is used only for the purpose of evaluating the four channel waiver request, an analysis that involves no comparison with competing applicants. *See In re North American Catholic Educational Programming Foundation, Inc.*, *supra*, 19 FCC Rcd at 20173 (J.A.), *citing Board of Regents, Eastern New Mexico University, supra*, 10 FCC Rcd at 3162 n.1; *Northern Arizona University Foundation, supra*, 7 FCC Rcd at 5944 n.6 (1992).

Finally, NACEPF claims that the Commission has never denied a request for waiver of the four channel limit since the rule was adopted and so has effectively modified or deleted the rule without the formal rulemaking proceedings required by the APA. NACEPF Br. at 26. The argument was not presented below in a manner sufficient to allow NACEPF to pursue it before this Court. *See* Section 405 of the Communications Act, 47 U.S.C. § 405. The closest NACEPF came to raising the argument was a statement at the end of NACEPF's reply to the opposition to its petition for reconsideration of the denial of its application for review. There, NACEPF asserted without elaboration that "never has the

Commission rejected a request for a waiver of the four channel limit rule [thus] essentially rendering the rule a nullity."[44]

Section 405 prohibits a party from seeking judicial review of an issue on which the Commission "has been afforded no opportunity to pass."[45] In this case, in the words of this Court in *Alianza Federal de Mercedes v. FCC,* 539 F.2d 732, 739 (D.C. Cir. 1976), "the grist was there, but nothing was made of it." As the Court held in *Alianza,* mere allusion to an argument is insufficient to satisfy the requirements of Section 405.[46]

In any event, NACEPF has not shown a *de facto* deletion or modification of the rule in violation of the APA. The rule remains in effect for the majority of ITFS licensees nationwide, and NACEPF has offered no basis to question the compliance of the numerous licensees that have not sought waiver of the four-channel limit. That the Commission has waived the rule when applicants satisfy the waiver standard does not support NACEPF's allegation, but rather demonstrates that the agency is following sound administrative procedure. More to the point, the Commission's decision to waive the rule in these circumstances is

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44 "Reply to Opposition," filed by NACEPF on November 6, 2003, at page 9 (J.A.).

45 *See Freeman Engineering Assoc., Inc. v. FCC,* 103 F.3d 169, 182-85 (D.C. Cir. 1997); *Time Warner Entertainment Co. v. FCC,* 56 F.3d 151, 201-02 (D.C. Cir. 1995), *cert. denied,* 116 S.Ct. 911 (1996).

46 Even if the Court were to find that NACEPF's unelaborated suggestion "was presented – if barely – to the Commission," that would not justify a remand here, for NACEPF did not "raise the issue with sufficient force to require [the Commission] to formally respond." *MCI WorldCom, Inc. v. FCC,* 209 F.3d 760, 765 (D.C. Cir. 2000).

amply supported by the record, in which CCSD made a compelling showing that it could not satisfy the educational needs of its rapidly expanding student population without additional channels. *See generally AT&T Wireless Services, Inc. v. FCC*, 270 F.3d 959, 965 (D.C. Cir. 2001) (upholding FCC decision to act by waiver rather than rulemaking to address unique circumstances).

CONCLUSION

The Court should dismiss this appeal for lack of jurisdiction. If the Court reaches the merits of the Commission's waiver decision, it should affirm.

Respectfully submitted,

SAMUEL L. FEDER
ACTING GENERAL COUNSEL

RICHARD K. WELCH
ASSOCIATE GENERAL COUNSEL

DANIEL M. ARMSTRONG
ASSOCIATE GENERAL COUNSEL

GREGORY M. CHRISTOPHER
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1753 (TELEPHONE)
(202) 418-5882 (FAX)

September 21, 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NORTH AMERICAN CATHOLIC EDUCATIONAL PROGRAMMING FOUNDATION, Appellant v. FEDERAL COMMUNICATIONS COMMISSION Appellee	)	CASE NO. 04-1384

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Appellee" in the captioned case contains 10682 words.

GREGORY M. CHRISTOPHER
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1753 (TELEPHONE)
(202) 418-5882 (FAX)

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